Nos. 80-1832, 80-2170 and 80-2171

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In the Supreme Court of the United States

OCTOBER TERM, 1982

IMMIGRATION AND NATURALIZATION SERVICE, APPELLANT

v.

JAGDISH RAI CHADHA, ET AL.

UNITED STATES HOUSE OF REPRESENTATIVES, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE, ET AL.

UNITED STATES SENATE, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE, ET AL.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT IN NO. 80-1832 AND ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT IN NOS. 80-2170 AND 80-2171

SECOND SUPPLEMENTAL BRIEF FOR THE IMMIGRATION AND NATURALIZATION SERVICE

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TABLE OF AUTHORITIES

Page

Cases:

Consumer Energy Council of America v. *FERC*, 673 F. 2d 425, appeals docketed and petitions for cert. pending, Nos. 81-2008, 81-2020, 81-2151, 81-2171, 82-177 and 82-209 ..... 3, 6

Consumer Union of the United States, Inc. v. *FTC*, No. 82-1737 (Oct. 22, 1982) 2

Dastmalchi v. *INS*, 660 F. 2d 880 4

Ghorbani v. *INS*, 686 F. 2d 784 ..... 4, 5

Shoji v. *INS*, 679 F. 2d 447 ..... 4, 5

Constitution, statutes and rule:

United States Constitution:

Article I 3

Section 7, Clauses 2 and 3 3

Federal Trade Commission Improvement Act of 1980, Pub. L. No. 96-252, 94 Stat. 393, 15 U.S.C. (Supp. IV) 45 *et seq.*:

Section 21(a), 15 U.S.C. (Supp. IV) 57a-1(a) 2, 3

Section 21(f)(1), 15 U.S.C. (Supp. IV) 57a-1(f)(1) 2

Page

Constitution, statutes and rule—Continued:

Section 21(f)(2), 15 U.S.C. (Supp. IV) 57a-1(f)(2) 3

Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.*:

Section 106(a), 8 U.S.C. 1105a(a) 4

Section 242(b), 8 U.S.C. 1252(b) 4, 5

Section 244, 8 U.S.C. 1254 5

Sup. Ct. R. 35.5 1

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1. Pursuant to Rule 35.5 of the Rules of this Court, the Solicitor General, on behalf of the

appellant-respondent Immigration and Naturalization Service, files this supplemental brief to inform the Court of the decision of the United States Court of Appeals for the District of Columbia Circuit in *Consumers Union of the United States, Inc.* v. *FTC*, No. 82-1737 (Oct. 22, 1982). That case involved a challenge to the legislative veto provision in Section 21(a) of the Federal Trade Commission Improvements Act of 1980, Pub. L. No. 96-252, 94 Stat. 393, 15 U.S.C. (Supp. IV) 57a-1(a), under which a final rule promulgated by the Commission becomes effective unless both Houses of Congress, within 90 calendar days of continuous session following submission of the rule to Congress, pass a concurrent resolution disapproving the rule. *Consumers Union* concerned such a resolution disapproving a Federal Trade Commission rule regarding representations of warranty coverage and disclosures of accurate information in connection with the sale of used cars.

In *Consumers Union*, the court of appeals, sitting en banc,[1] unanimously held[2] that Section 21(a)

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[1]The case was considered pursuant to a special statutory procedure applicable to constitutional challenges to the legislative veto provision of the Federal Trade Commission Improvements Act. Under that procedure, any interested party may file an action in the appropriate United States District Court challenging the legislative veto provision, and the constitutional questions then are certified to the court of appeals sitting en banc. 15 U.S.C. (Supp. IV) 57a-1(f)(1).

[2]Judges Wald, Mikva, and Scalia did not participate in the decision.

and the concurrent resolution of disapproval passed by the Senate and House of Representatives pursuant to that Section are unconstitutional because they "violate the principles of separation of powers established in Articles I, II and III of the Constitution" and because they "violate the procedures established by Article I for the exercise of legislative powers" (slip op. 6).[3] In so holding, the en banc court of appeals adopted the reasoning of the panel of that court in *Consumer Energy Council of America* v. *FERC*, 673 F.2d 425 (D.C. Cir. 1982), appeals docketed and petitions for cert. pending, Nos. 81-2008, 81-2020, 81-2151, 81-2171, 82-177 and 82-209, which, the court observed, had "thoroughly considered and disposed of" these constitutional issues (slip op. 6).[4] For the convenience of the

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[3]Because Section 21(a) of the Federal Trade Commission Improvements Act provides that a resolution of disapproval must be passed by both Houses of Congress, one of the two constitutional requirements for the exercise of legislative power — bicameral approval of the measure — was satisfied in the *Consumers Union* case. The court's holding that Section 21(a) and the resolution of disapproval "violate the procedures established by Article I for the exercise of legislative powers" therefore necessarily referred to the requirement in Article I, Section 7, Clauses 2 and 3 that any bill or resolution intended to have binding effect outside of the Legislative Branch be presented to the President for his approval or veto after it has been passed by the Senate and House of Representatives.

[4]Section 21(f)(2), 15 U.S.C. (Supp. IV) 57a-1(f)(2), provides that any decision on a matter certified to the court of appeals "shall be reviewable by appeal directly to the

Court, we have lodged ten copies of the decision in *Consumers Union* with the Clerk of this Court.

2. We also take this opportunity to inform the Court of two decisions of other courts of appeals that concern the jurisdiction of a court of appeals under Section 106(a) of the Immigration and Nationality Act, 8 U.S.C. (& Supp. V) 1105a(a), on a petition for review of an order of deportation. *Ghorbani* v. *INS*, 686 F.2d 784 (9th Cir. 1982); *Shoja* v. *INS*, 679 F.2d 447 (5th Cir. 1982). Those cases involved challenges by Iranian aliens who were admitted on student visas, but who were subsequently ordered deported because they were out of status, to the failure of the District Director to take various discretionary actions that would have had the effect of restoring the aliens to student status. The Ninth and Fifth Circuits held that they did not have jurisdiction to review the District Director's actions because those actions occurred in proceedings that were separate and distinct from the deportation proceedings conducted by the Immigration Judge under Section 242(b) of the Act, 8 U.S.C. 1252(b).

The holdings in these cases are correct and are consistent with the holding of the Third Circuit in *Dastmalchi* v. *INS*, 660 F.2d 880 (1981), discussed

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Supreme Court of the United States" brought "not later than 20 days after the decision of the court of appeals." The Senate and House of Representatives filed notices of appeal to this Court on November 4, 1982, within 20 days of the court of appeals' decision of October 22, 1982.

in our principal brief in this case (at 71-72 & n.44). As we also explain in our principal brief (at 71-72 & n.44), these holdings regarding jurisdiction to review the actions of the District Directors (including the constitutionality of the regulations pursuant to which they ordered Iranian students to report for review of their status) are fully consistent with the Ninth Circuit's jurisdictional holding in the instant case. Respondent-appellee Chadha did not challenge any actions of a District Director taken outside the context of deportation proceedings under Section 242(b) of the Act, as in *Ghorbani* and *Shoja*. He instead challenged the validity of the final order of deportation that was entered against him in the deportation proceedings under Section 242(b) of the Act, on the ground that the legislative veto provision in Section 244 of the Act, 8 U.S.C. 1254, that required the Immigration Judge to enter the deportation order is unconstitutional. Thus, as the Ninth Circuit observed in *Ghorbani* (686 F.2d at 790; footnote omitted), in distinguishing *Ghorbani* from this case, "[i]n *Chadha*, the constitutionality of section 244, the very statute under which relief was granted by the immigration judge, was an integral part of the section 242(b) proceedings."[5]

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[5]The Fifth Circuit also recognized that the jurisdictional issue in *Shoja* was distinct from that in the instant case, and it expressed no view on the correctness of the jurisdictional holding of the Ninth Circuit in this case. 679 F.2d at 451 n.3.

For the foregoing reasons and the additional reasons set forth in our principal brief and in our supplemental brief filed in February 1982 calling the Court's attention to the decision in *Consumer Energy Council of America* v. *FERC, supra,* it is respectfully submitted that the judgment of the court of appeals should be affirmed.

REX E. LEE
Solicitor General

NOVEMBER 1982

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